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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. _____

Supreme Court, U. S.
FILED
MAR 13 1972
MICHAEL RODAK, JR., CLERK

Willodean Forks
Conrad Forks
Kaleen Kehoe
Richard L. Kehoe, Jr.
Stephen M. Kerr
Lynn K. Coyle
William M. Coyle
Mary C. Grover, Petitioners,

v.

City of Warsaw, Indiana, Respondent

Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana

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Mary C. Grover, Petitioners,

v.

City of Warsaw, Indiana, Respondent

Petition for a Writ of Certiorari to the Supreme Court of the State of Indiana

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Indiana entered in the above entitled cause on October 19, 1971, petition for rehearing denied on December 15, 1971.

Opinion Below

The opinion of the Supreme Court of Indiana affirmed the judgment of the Kosciusko Circuit Court, Indiana; is reported in 273 NE2d 856, and appears in Appendix A.

## Jurisdiction

The judgment of the Supreme Court of Indiana was entered on October 19, 1971, petition for rehearing denied on December 15, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## Statute Involved

Legislative acts of the Indiana legislature involved are: § 48-701 and § 48-702 of the 1963 Replacement Volume 9, Part 1, of Burns Indiana Statutes, being section 1 and 3 respectively of Chapter 269 of the Acts of the General Assembly of Indiana for the year 1955; appear in Tr. pp. 31-37.

## Provision of the United States Constitution Involved

The provision of the United States Constitution involved is the following part of §1 of Amendment 14: "Nor shall any state deprive ***; nor deny to any person within its jurisdiction the equal protection of the laws".

## Question Presented

The question presented is whether or not the said sections of the Indiana Statutes are violative of the said provisions of §1 of Amendment 14 of the United States Constitution in denying to

the petitioners the privilege of remonstrating against ordinance no. 535 of the respondent City of Warsaw, Indiana, seeking to annex territory of which the petitioners are permanent residents and qualified voters and in which they do not own real estate but do own personal property, tangible and intangible, of substantial value located in the said territory and who are citizens of the United States and of the State of Indiana, while the said sections of the Indiana statute, at the same time, grant the privilege of such remonstrance solely to owners of real estate located in the said territory, whether or not such landowners reside in the said territory permanently, temporarily, or not at all.

Bearing upon such question are the questions:

(1) Whether or not the said sections of the Indiana statutes present a classification which on its face is arbitrary (Smith v. Cahoon, 283 U.S. 553, 567, 75 L. ed. 1264, 1269, 51 S. Ct. 582) or that may appear by facts admitted or proved. Southern R. Co. v. Greene, 216 U.S. 400, 417, 54 L. ed. 536, 541, 30 S. Ct. 287, 17 Ann. Cas. 1247; Air-Way Electric Appliance Corp. v. Day, 266 U.S. 71, 85, 69 L. ed. 169, 177, 45 S. Ct. 12; Concordia F. Ins. Co. v. Illinois, 292 U.S. 535, 549, 78 L. ed. 1411, 1420, 54 S. Ct. 830; or

(2) Whether or not the judgment should be reversed and the cause remanded for hearing of evidence on the allegations

of the complaint. Borden's Farm Products Co., Appellant v. Baldwin (1934), 293 U.S. 194-213, 79 L. ed. 281, 289; and

(3) Whether or not the details of the so-called remonstrative process set out in the said § 48-702 of the Burns Indiana Statutes in substance constitute an elective process comparable to those involved in the cases of Morris M. Kramer v. Union Free School District No. 15 (June 16, 1969) 395 U.S. 621, 23 L. ed. 2d 583, 89 S. Ct., 1886, and Cipriano v. Houma (June 16, 1969), 395 U.S. 701, 23 L. ed. 2d 647, 89 S. Ct. 1897, and, if so,

(4) Whether or not such remonstrative process (also elective process) is subject to the same, or equally discriminatory, effects as those of the statutes found violative of the equal protection of the laws clause in the said Kramer and Cipriano cases, supra; and, if so

(5) Whether or not the exclusion of the petitioners from the right to remonstrate (to vote against annexation) was necessary to protect a compelling state interest. Kramer and Cipriano cases, supra.

## Statement

The Indiana statute here involved, in providing a method for annexation of territory by cities by ordinance subject to conditions, granted the right of remonstrance solely to owners of the real

estate located in the territory sought to be annexed (Tr. pp. 31-37). In the event a majority of such landowners did not remonstrate, the ordinance became effective. In the event a majority of such land owners remonstrated, annexation did not take place unless the Court in which the remonstrance was filed, found, upon trial of the remonstrance, that certain "determinants" as specified in the statute, existed. Where a tract of land was owned by more than one person, only one of such persons was entitled to be counted as a remonstrator. The judge of the court in which the remonstrance was filed determined the total number of landowners qualified to remonstrate, and the number remonstrating.

In their complaint seeking to set aside the ordinance no. 535 of the City of Warsaw to annex territory, the petitioners alleged that they owned no real estate in the territory, but that they were and had been for several years residents and registered voters of the territory, and owners and occupants of mobile homes, and owners of other personal property, both tangible and intangible, in the territory, and alleged in detail their interests in, and the effects of, annexation, upon them; that they were just as much, if not more, interested in, and affected by, the annexation sought, as were the owners of the real estate located in the territory; that there were only seven owners

of the real estate in the territory and that three only had remonstrated, less than the majority required to compel the prerequisite finding by the Court of the existence of the "determinants" for annexation; and alleged the conclusion that the statute's denial of the privilege of remonstrance to them while granting it to owners of real estate was clearly an arbitrary classification, and an irrational discrimination against them. Petitioners further alleged that the statute violated the equal protection of the laws clause of §1 of Amendment 14 of the United States Constitution, not only in that the classification was clearly arbitrary and without rational basis, on its face, which removed the presumption of the statute's validity, but also by the removal of such presumption otherwise by the fact that the remonstrative process set up by the statute was in substance also an elective process.

The petitioners initiated their proceedings against the respondent City of Warsaw in the Kosciusko Circuit Court at Warsaw, Indiana, on March 29, 1969, and filed therein their amended and supplemental complaint on November 21, 1970. Petitioners' complaint (their second amended and supplemental) appears at pages 42, 43 and 44 and at 63, 64 and 65 of the original transcript now on file in the Office of the Clerk of this Court. The respondent City moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could

be granted (Tr. p. 39). The Kosciusko Circuit Court, by special judge, sustained the motion to dismiss on December 3, 1970 (T. p. 40). Petitioners filed motion to correct error on December 23, 1970 (Tr. pp. 42-46), which the special judge overruled on December 29, 1970 (Tr p. 65). Petitioners appealed to the Supreme Court of Indiana assigning as error the overruling of the motion to correct error. The Supreme Court of Indiana affirmed the ruling of the Court below (Appendix A), one member of the Court writing a separate opinion of which the first paragraph states the gist as follows:

> "If appellants had objected to the summary procedure adopted by the trial court, either in the trial court or in their brief on appeal, I would vote to remand this case to the trial court for a full trial. In every case dealing with a constitutional claim, an unrestricted opportunity should be afforded the litigants to completely present the facts neccessary to support their claims. However, in my view of the record and briefs in this case, appellants have never contended that the trial court committed error in making a summary disposition of their constitutional claim. Thus, because of the posture of this case, I would concur in the result of the majority opinion wherein it holds that the trial court did not commit error in this case by following a summary type procedure."

Pertinent parts of Trial Rules 12 and 56 of the Indiana Supreme Court, governing procedure on motions to dismiss and for summary judgment appear in Appendix B.

Errors of Fact in Opinion Below

Before consideration of the conclusions of both the majority and minority opinions, we should point out the following errors of fact clearly appearing therein:

(1) The fifth sentence beginning with "The prayer of appellants' complaint" casts the definite implication that the owners of the real estate in the territory sought to be annexed were residents of such territory. The complaint did not so allege.

(2) The second paragraph of the opinion casts the definite implication that the facts stated in the first paragraph of the opinion to-wit, that petitioners owned no real estate in the territory sought to be annexed but did own mobile homes and personal property, tangible and intangible, in the territory, and that the Indiana statute provided for remonstrance by owners of real estate only, were the only facts alleged in the complaint. However the complaint alleged many other facts, among which were that for several years last past the petitioners had been and were then citizens of Indiana and of the United States of America and registered voters of the territory sought to be annexed, and throughout such

period they had owned, and then owned, personal property, tangible and intangible, including mobile homes assessed and taxed as personal property and occupied by them, that such personal property was then and had been continuously of substantial value; that all petitioners were as much or more interested in, the attempted annexation as were the owners of the real estate located and taxable in the territory; that petitioners' residences in the territory had been as long and continuous on the average as the residences and ownership of real estate by resident owners thereof, and that the petitioners' ownership of personal property in the territory had been longer than the average time of the ownership of real estate in the territory by non-residents thereof. Other facts in detail were alleged in the succeeding rhetorical paragraphs 6 to 10 inclusive of the complaint (Tr. pp 47 - 54).

(3) In the third paragraph of the opinion (Appendix A,p. v) it is stated that "Inhabitants who do not own land are more likely to be temporary residents whereas landowners have a greater tendency to be permanent residents". The complaint alleged the contrary, supra.

(4) In the fifth paragraph of the opinion it is stated (Appendix A, p. vii):

> "Appellants next contend that the remonstrance provided for in the statute is an election for a special purpose and as such denies the appellants, who are registered voters, equal protection of the law."

The statement implies that petitioners based their position solely on the ground that they were registered voters of the territory sought to be annexed. However the complaint alleged that the Indiana Statute had denied them the equal protection of the law not only as such registered voters of the territory but also as owners of personal property only, including mobile homes owned and occupied by them in the territory, and as citizens of Indiana and of the United States within the jurisdiction of Indiana (Tr. p. 53).

(5) The statement in the fifth paragraph of the opinion that "a remonstrance is not an election in any sense of the word" (Appendix A, p. viii), is palpably incorrect. In §48-702 the process was a "choosing or selection, by those having the right to participate, *** of public measures which shall be adopted or rejected". 25 AM Jur 2d, 691, Elections, §1. In Ballantine's Law Dictionary (1930), the following meanings are given to the word "vote":

> "suffrage, voice, or choice of a person for or against a measure;"

and an "elector" is a:

> "technical generic term, descriptive of a citizen having constitutional and statutory qualification that enables him to vote, and including not only those who vote, but also those who are qualified, yet fail to exercise the franchise".;

and an "elective franchise" is defined as:

> "the right to vote at an election; the right of suffrage; it is not a natural right or a civil right, but

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> a privilege conferred upon the person by the constitution and the laws of the State. It is rather a privilege than a right and is dependent upon public policy. It has been called a political right."

All of the elements of an election for a special purpose were provided in the statute in question here. It is immaterial that the word "election" does not appear in the statute. Nor does it matter what name is given to the proceedings. It may be a "referendum" or a "remonstrance". It is the substance that counts. Morris v. Powell (1890), 125 Ind. 281, 25 NE 221.

In the case of Taggart, Auditor v. Claypool (1896), 145 Ind. 590, 44 NE 18, where the 1891 annexation statute required remonstrance of 75% of the resident freeholders, the Court's opinion recognized the procedure (the remonstrance) as a method of determining the "voice" of the resident landowners, and compared the non-resident landowners' lack of right to remonstrate to his lack of right "to vote on a local school tax levy in his territory". In the instant case, the remonstrance was a "voice" or "vote" in rejection of a public measure, within the definition of "election" - 25 AM JUR 2d, 691, supra. In the Taggart case all resident landowners were "electors" as defined in Ballantine, supra; and in § 48-702 all landowners, both resident and non-resident, are electors, with limitation as to the method of count thereof as provided by the statute. The judge is the election board, bound by the method

of counting as specifically provided by the statute. It does not matter in what form the "voice" or "vote" is cast.

(6) In the last sentence of the second paragraph of the majority opinion it is stated that the case was summarily disposed of upon the pleadings (Appendix A, p. iv); and in the last sentence of the first paragraph of the minority opinion it is also stated that the trial court followed a summary type procedure (Appendix A, P. ix). Such was clearly not the fact. Matters outside the pleading were not presented to the trial court. Indeed, the opinion itself says in the second paragraph:

> "Appellants first claim the trial court erred in sustaining the motion to dismiss claiming that if a case is well pleaded, judgment should be made on the basis of the facts presented. However, in the case at bar there is no contest of the facts. The facts are completely presented by appellants' complaint and the exhibits attached thereto. These facts are quite simple and are not contested by the appellee". (Appendix A, p. iii)."

Neither the petitioners nor the respondent City filed motion for summary judgment with or without supporting affidavits. See Appendix B. The disposition was clearly not summary, but was the same as a sustaining of a demurrer to a complaint with the complainant refusing to plead over. Such was the clear implication of the peti-

tioners' motion to correct error in which the sustaining of the motion to dismiss was the error claimed. The trial court was obviously following the comments of the State of Indiana Civil Code Study Commission in its trial draft of Indiana Rules of Civil Procedure of August 6, 1968, as follows:

> "Rule 12 (b) (6). The motion to dismiss for failure to state a claim upon which relief can be granted serves basically the same function of the demurrer under the prior practice, that is, to test the legal sufficiency of the complaint. Unlike the prior practice, however, the new rules do not require that the complaint state all the elements of a cause of action. As stated by one federal court, 'Our duty...is to consider whether in the light most favorable to the plaintiff, with every intendment regarded in his favor, the complaint is sufficient to constitute a valid claim.' Tahir Erk v. Glen L. Martin Co., 116 F 2d 865 (4th Cir. 1941). Thus, the motion to dismiss usually will be sustained only when it is clear that under no conditions can the plaintiff recover, as would occur in a case in which the statute of limitations has run." "***."

together with the earlier case of Heckler v. Conter, Treas., et al (1933), 206 Ind. 376, 187 NE 878, wherein the opinion of the Supreme Court of Indiana reads as follows:

"Appellant brought this action seeking a judgment declaring Chapter 31, p. 153, of the Acts of 1933, unconstitutional. A demurrer to the complaint was sustained, and, upon refusal to plead further, there was judgment against appellant, from which this appeal is prosecuted.

"The only error assigned is upon the ruling on the demurrer, and the only questions presented involve the constitutionality of the act." "***."

"The law in question isolates three second class cities and one fourth class city. No reason is suggested or apparent why their situation is such that the country treasurer in the county in which they are located should collect their taxes and maintain a branch office within their confines that does not apply to every second or fourth class city in the state. *** The classification cannot stand the test. ***

"*** We conclude that the act is unconstitutional because in conflict with the provisions of Section 23 of Article 4 of the Constitution, and, in view of this conclusion, it is unnecessary to consider the other questions presented.

"The judgment is reversed, with instructions to the trial court to

overrule the demurrer, and for further proceedings not inconsistent with this opinion."

If the law was to the contrary in Indiana at the time the trial judge sustained the City's motion to dismiss the complaint in the case at bar, we have been unable to find any evidence of it.

## Why the Petition for Writ of Certiorari Should be Granted

We shall take up the questions presented, supra, in the order in which we believe that the petitioners' position may be the strongest (although, of course, we believe all of our positions are sound).

Our first contention is (in answer to questions (3) and (4), p. 4, supra,) that § 48-702 of Burns Indiana Statutes provides an elective process for the choosing, by those having a right to participate, of a public measure which shall be adopted or rejected, and that such process is violative of the protection of the laws clause in the same manner and degree as the elective processes struck down by this Court in the Kramer and Cipriano cases, supra, the summaries of which appear in appendices C and D. Of course the statute's method of determining the will of the majority is not an "election" within definition given in the Indiana Election Code for the purpose of that code (Appendix E); but such election code does not purport to cover "elections" universally. The provisions of §48-702 do come within the definition

of elections in 25 Am. Jur. 2d 691, Elections, §1, supra, p.10 . Actually it would seem that the majority opinion admits such to be the case in its statement as follows:

> "we therefore hold that the right to remonstrate is not an election to the extent that all voters in the community must be afforded the opportunity to participate" (Appendix A, p. viii)

Such holding has as its underlying premise that the provisions of §48-702 do constitute an election, and is saying that such provisions however are not an election as defined by the Indiana Election Code. We agree, of course, that such conclusion is correct; and thereby supports the position that §48-702 may not be presumed to have a rational basis for the discrimination appearing therein; a discrimination even more glaring than the Kramer and Cipriano cases in the fact that under the provisions of §48-702, those failing to remonstrate (to vote against annexation) are unrealistically counted in favor thereof, whereas in the Kramer and Cipriano cases, it was the majority of those voting who prevailed. We therefore respectfully submit that the §48-702 does constitute an elective process very closely comparable to those involved in the Kramer and Cipriano cases.

We contend next (in answer to question (5), p. 4, supra) that the exclusion of the petitioners from the right to remonstrate (to vote against annexation) was not necessary to protect a compelling state interest." The only justification for the statute in the opinion is that

the limitation of the privilege of remonstrance to landowners was:

> "There can be no question but that annexation affects all persons residing within the territory. However, there are substantial differences which warrant the legislative classification in the statute in question. Inhabitants who do not own land are more likely to be temporary residents whereas landowners have a greater tendency to be permanent residents. The landowner has an investment in property which he cannot remove from the territory. His only escape is to dispose of his real estate; whereas the person who does not own land, but like the appellants owns only personal property, need only remove his person and property from the territory. We hold that the legislature adopted a reasonable classification in providing for remonstrance by those persons who owned real estate within the territory. The substantial nature of their interest and the immovability of the real estate justified the classification." (Appendix A, p. v)

Petitioners' complaint, as we have pointed out, refuted all of such findings with exception perhaps of the immovability of the real estate. (Tr. pp. 20-28).

The above reasoning is basically the same as that of the appellee, Union Free School District No. 15, in the Kramer case, supra, wherein the appellee argued that it was necessary to limit the franchise to those "primarily interested" in schools

in the district, that is, to those owning or leasing taxable real property in the district, and parents, or those having custody, of children enrolled in the local public schools. The Supreme Court of the United States answered as follows:

"Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. See Carrington v Rash, supra, at 96, 13 L Ed 2d at 680." "***"

"Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable. See Harper v Virginia Bd. of Elections, 383 US 663, 670, 16 L Ed 2d 169, 174, 86 S Ct 1079 (1966). The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are

based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality."

"The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment. States do have latitude in determining whether certain public officials shall be selected by election or chosen by appointment and whether various questions shall be submitted to the voters. However, once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. Harper v Virginia Bd. of Elections, supra, at 665, 16 L Ed 2d at 171." "***"

"Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not." "***"

"Appellant asserts that excluding him from participation in the district elections denies him equal protection of the laws. He contends that he and

others of his class are substantially interested in and significantly affected by the school meeting decisions. All members of the community have an interest in the quality and structure of public education, appellant says, and he urges that 'the decisions taken by local boards ... may have grave consequences to the entire population'. Appellant also argues that the level of property taxation affects him, even though he does not own property, as property tax levels affect the price of goods and services in the community. We turn therefore to question whether the exclusion is necessary to promote a compelling state interest. First, appellees argue that the State has a legitimate interest in limiting the franchise in school district elections to 'members of the community of interest'--those 'primarily interested in such elections.' Second, appellees urge that the State may reasonably and permissibly conclude that 'property taxpayers' (including lessees of taxable property who share the tax burden through rent payments) and parents of the children enrolled in the district's schools are those 'primarily interested' in school affairs." "***"

"Whether classifications allegedly limiting the franchise to those resident citizens 'primarily

interested' deny those excluded equal protection of the laws depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal. Section 2012 does not meet the exacting standard of precision we require of statutes which selectively distribute the franchise. The classifications in § 2012 permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions."

"***"

"But the issue is not whether the legislative judgments are rational. A more exacting standard obtains. The issue is whether the § 2012 requirements do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class. The requirements of § 2012 are not sufficiently tailored to limiting the franchise to those 'primarily interested' in school affairs to justify the denial of the franchise to appellant and members of his class. The judgment of the

United States District Court for the Eastern District of New York is therefore reversed. The case is remanded for further proceedings consistent with this opinion."

Thus also the classification in §48-702 permits inclusion of many persons who have, at best, a remote and indirect interest in annexation, and, on the other hand, excludes others who have a distinct and direct interest in annexation. See petitioners' complaint (Tr. pp. 20-27), wherein the allegations show a lesser interest in annexation on the part of the owners of the real estate in the territory sought to be annexed who do not reside therein than the owners of personal property of substantial value therein, who are and have been for several years last past resident and registered voters of the territory. Thus also, no articulated state interest is present in § 48-702. The requirements of § 48-702 are not sufficiently tailored to limiting the franchise to those having "a greater tendency to be permanent residents", supra, p. 17, even if that were true, the complaint to the contrary notwithstanding; for the reason that if such were true, which we dispute (e.g. the common knowledge of the hundreds of thousands of occupants of mobile homes owned or rented by them who are permanent residents and voters of the areas or parks wherein such homes are located, who work in the surrounding factories, businesses, stores or fields, and compose a substantial portion of the population, both young and old; and the

fruther common knowledge that a substantial portion of the population prefers to rent than to own homes and often live out their lives in rented homes as a matter or preference, for economic and other reasons), nevertheless such evidence (that inhabitants who do not own land are more likely to be temporary residents, whereas landowners have a greater tendency to be permanent residents) would be wholly insufficient to indicate that the interest of the land owner (resident or non-resident) in annexation would be substantially greater than the interest therein of the resident voter and owner of personal property solely.

The case of Rogers v City and County of Denver (1966), 161 Colo. 72, 419 P. 2d 648 cited in the opinion below of the Supreme Court of Indiana is of no real relevance in this petition, for the reason, firstly, it is not a decision of this court, secondly, the statute there involved did not provide for an election or the equivalent thereof, but was rather a proceedings to decide whether an election should be called, and thirdly, it did not appear that owners of personal property only had objected to the classification. So far as the theory that "inasmuch as the legislature may provide for the annexation of territory to municipal corporations without the consent of the inhabitants of the annexed territory, the inhabitants cannot complain of any limitations upon their ability to express their disapproval if the legisla-

ture sees fit to make the statute conditional upon its acceptance by the affected territory" is concerned, such is not the case in the statute here involved. Here we have a statute which the legislature was not required to enact, but having done so, it is not authorized to grant privileges to some and not to others similarly situated. This is true of a myriad of statutes creating rights or privileges not theretofore held by those to whom such statutory rights or privileges are granted; but in doing so, the legislature may not be arbitrarily discriminatory. In the case at bar the legislation is arbitrarily discriminatory. As stated in the Kramer case,

> "States do have latitude in determining *** whether various questions shall be submitted to the voters. ***. However 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.'" 23 L Ed 2d, at p. 591.

The Cipriano case is perhaps even more similar to the case at bar on the facts. In Cipriano the Louisiana statute excluded non-property owning voters from participation in a special election held by the City of Houma on question of whether or not revenue bonds of the municipal utility of the City should be issued to obtain funds for extension and improvement of the utility system. Cipriano, a qualified voter, but without

property, brought suit in U.S. District Court to enjoin the bond issue and for declaratory judgment of unconstitutionality of the statute. Upon dismissal of the suit by the District Court, Cipriano appealed directly to the Supreme Court of the United States. The majority opinion followed the Kramer case, and upon the same reasoning, reversed the lower court.

It is submitted that the facts of the instant case do clearly fall in the same class as those of the Kramer and Cipriano cases; that the reasoning of the said cases applies in like manner to the case at bar.

We contend lastly, in answer to questions (1) and (2), pp 3 and 4, supra, that not only is the statute here in question in the same class with those of Kramer and Cipriano and subject to the same reasoning employed by the majority of the court in said cases, and therefore unconstitutional, but that said statute is also violative of the equal protection of the laws clause on the ground that it involves a "voting classification wholly irrelevant to achievement of the state's objective" just as the statute in the Cipriano case was so held by Justices Black and Stewart in that case. See Summary, 23 L Ed 2d 647. Thus also, the granting of the remonstrance privilege (the privilege of voting against the public measure here involved) to land owners exclusively, resident and non resident alike, while at the same time excluding from such

privilege permanent residents who were voters of the territory and owners of personal property, both tangible and intangible of substantial value, located in the territory throughout the period of the residence therein of said owners, had no relevance to the achievement of the state's objective in the statute here in question.

In the event the court is of opinion that the petitioners are not entitled to judgment of the statute's violation of the Equal Protection Laws Clause on the present record, it is submitted that they are entitled to reversal and order remanding the case to the trial court for hearing of evidence on the allegations of the petitioners' second amended and supplemental complaint, whether or not this court considers the case as one involving "elections". Borden's Farm Products Co. v. Baldwin (1934), 239 U.S. 194-213, 79 L ed 281.

## CONCLUSION

In conclusion it is submitted that the questions herein raised: - of whether or not the statute in the instant case is within the prohibitions laid down in the Kramer and Cipriano cases; of whether or not the statute is arbitrary on its face in that there is no relevance between the granting of exclusive privilege of remonstrance to some while excluding the such privilege from others equally interested, and the achievement of the State's objective in the statute; and of whether or not the judgment should be reversed and remanded for hearing of

evidence on the second amended and supplemental complaint:- are all truly substantial, and present to this Court far reaching issues of great public importance, and should be answered.

Respectfully submitted,

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APPENDIX A

| Attorney for Appellants: | Attorneys for Appellee: |
|---|---|
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IN THE
SUPREME COURT OF INDIANA

| | | |
|---|---|---|
| WILLODEAN FORKS<br>CONRAD FORKS<br>KALEEN KEHOE<br>RICHARD L. KEHOE, JR.<br>STEVEN M. KERR<br>LYNN K. COYLE<br>WILLIAM M. COYLE<br>MARY C. GROVER,<br>APPELLANTS | ) | No. 171 S 11 |
| v. | ) | |
| CITY OF WARSAW, INDIANA<br>APPELLEE | ) | |

APPEAL FROM KOSCIUSKO CIRCUIT COURT
The Hon. Harold D. Stump, Special Judge

GIVAN, J.

This is an appeal from a judgment sustaining a motion to dismiss appellants' second amended and supplemental complaint to set aside and vacate Ordinance No. 535 of the City of Warsaw, Indiana. The ordinance purported to annex certain territory to the City of Warsaw. The appellants do not own real estate located within the territory sought to be annexed. They do, however, own "mobile homes *** and are owners of other tangiable and intangible personal property in the territory ***." The prayer of appellants' complaint asked that Burns Ind. Stat., 1963 Repl., §§ 48-701-702 be declared in violation of Article 1, § 23 of the Constitution of Indiana and the Fourteenth Amendment to the Constitution of the United States in that the statute provides for remonstrance by owners of real estate only, thus denying equal protection of the laws to other residents of the affected territory. Appellants thus contend that Ordinance No. 535 of the City of Warsaw enacted under authority of an unconstitutional statute is, therefore, void. Appellee's motion to dismiss was filed under the Rules of this Court, TR 12(B)(6) upon the contention that the complaint failed to state a claim upon which relief could be granted. This Court has jurisdiction of this case under Burns Ind. Stat., 1968 Repl., § 4-214 which statute provides for cases questioning the constitutionality of a statute or an ordinance of a municipal corporation to be appealed directly to this Court.

Appellants first claim the trial court erred in sustaining the motion to dismiss claiming that if a case is well pleaded, judgment should be made on the basis of facts presented. However, in the case at bar there is no contest of the facts. The facts are completely presented by appellants' complaint and the exhibits attached thereto. These facts are quite simple as above set out and are not contested by the appellee. Therefore, under paragraph 8 of TR 12 the trial court was justified in rendering judgment upon the pleadings in response to appellee's motion to dismiss. Prior to the adoption of Rule 12, the law had been that if it appears to a certainty that no relief can be granted under any set of facts which can be proved in support of the allegations in a complaint, then dismissal is proper. Conley v. Gibson (1957), 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80. In the case at bar the appellants have stated they resided in the territory sought to be annexed; that they do not own real estate in that territory and, therefore, cannot file a remonstrance under the statute, thus the statute is unconstitutional in denying them equal protection of the law. The motion to dismiss admits these facts. 21 I.L.E., Pleading and Pretrial Practice, § 103, page 265. The only issue, therefore, before the trial court was the determination as to whether or not the statute was constitutional in view of the existing factual

situation. We hold the trial court did not err in summarily disposing of the case upon the pleadings.

We thus come to the question as to whether or not the statute here challenged is unconstitutional as claimed by the appellants. The legislature has the power to authorize the extension of the boundaries of a municipal corporati The individual property owner does not have a vested interest in the maintenan of those boundaries at any particular location. Woerner, etc. v. City of Indianapolis (1961), 242 Ind. 253, 177 N.E. 2d 34. The General Assembly of Indiana has chosen to give a statutory right of remonstrance to owners of land located within territory sought to be annexed by a municipal corporation as provided in the statute here challenged. Prior to the passage of the above statute this Court had held that territory may be annexed with or without the consent of the inhabitants therein. Taggar Auditor et al. v. Claypool (1896), 145 Ind. 590, 44 N.E. 18. The question is then, did the legislature by giving the right of remonstrance to some of the inhabitants within the territory deny equa protection to those residents who were not given the right of remonstrance? I is well established that the equal protection clause does not prevent reasonable classification. Morey v. Doud (19 354 U.S. 457, 77 S. Ct. 1344, 1 L.Ed. 2d. 1485; McErlain v. Taylor (1934), 207 Ind. 240, 192 N.E. 260. In order to be reasonable the classification must

not be arbitrary or capricious, and it must bear a reasonable relation to the object of the legislation. Morey v. Doud, supra, Bolivar Twp. Bd. of Finance v. Hawkins (1934), 207 Ind. 171, 191 N.E. 158. There can be no question but that an annexation affects all persons residing within the territory. However, there are substantial differences which warrant the legislative classification in the statute in question. Inhabitants who do not own land are more likely to be temporary residents, whereas landowners have a greater tendency to be permanent residents. The landowner has an investment in property which he cannot remove from the territory. His only escape is to dispose of his real estate; whereas, the person who does not own land, but like the appellants owns personal property, need only remove his person and property from the territory. We hold that the legislature adopted a reasonable classification in providing for remonstrance by those persons who owned real estate within the territory. The substantial nature of their interest and the immovability of the real estate justifies the classification.

This general principle of law was recognized by the Colorado Supreme Court in Rogers v. City and County of Denver (1966), 161 Colo. 72, 419 P. 2d 648. This case had a factual background stronger than that presented by the appellants in this case. In the Colorado case the appellant landowners had signed a petition to avoid annexation; however,

a number of those signing were rejected by the City Council for the reason that they had purchased their land in the year 1964 and were, therefore, not liable for any property tax in the year of 1963, which was the year next preceding the year in which the petition was filed. The statute in question defined a landowner as an owner in fee who in the next preceding calendar year becomes liable for a property tax thereon. The Colorado Supreme Court held that the provisions of the statute cannot violate the appellants' right to equal protection and in so doing quoted from 37 Am. Jur. at page 648 as follows:

> "'Consent of Inhabitants.--It is well settled that the legislature may...authorize the annexation of, contiguous or other territory without the consent or even against the remonstrance of persons residing therein. The legislature may, however, and usually does, provide for such consent as a condition of annexation. Inasmuch as the legislature may provide for the annexation of territory to municipal corporations without the consent of the inhabitants of the annexed territory, the inhabitants cannot complain of any limitations upon their ability to express their disapproval if the legislature sees fit to make the statute conditional upon its acceptance by the affected territory.'"
> 161 Colo. at p. 74.

The Colorado Court went on to say:

> "...(I)t is said that, absent constitutional restrictions, the several

state legislatures enjoy 'unlimited powers' over the annexation of territory by municipalities and may place 'any requirement or condition thereon.'" 161 Colo. at p. 75.

Appellants next contend that the remonstrance provided for in the statute is an election for a special purpose and as such denies the appellants, who are registered voters, equal protection of the law. With this we cannot agree. A remonstrance is not an election in any sense of the word. Appellants quote from 25 Am. Jur. 2d, Elections, §1, page 691 as follows:

"An election may be broadly defined as the expression of a choice by the voters of a body politic, or as the means by which a choice is made by the electors. In a more restricted sense, an election is a choosing or selection, by those having a right to participate, of persons to fill public offices or of public measures which shall be adopted or rejected."

Burns Ind. Stat., 1970 Supp., § 29-2802 defines election as follows:

"'Election.' The word 'elections' ('election') shall mean and include any election at which the electors of the state or of any sub-division thereof nominate or choose by ballot public officials or decide any public question lawfully submitted to them."

The definitions above quoted are broad enough to cover both the choice of

individuals to hold public office and the submission of a public question for referendum. The Indiana Legislature might well have provided for a referendum on questions of annexation; however, this they did not choose to do. In a referendum, the question is submitted to the entire voting public for a choice. The purpose of a remonstrance is to afford the opportunity to any person seeking to object to the proposed action of a body politic by taking the affirmative step to register their objection. We, therefore, hold that the right to remonstrate as provided by the statute in question is not an election to the extent that all voters in the community must be afforded the opportunity to participate. We find no error on the part of the trial court.

The trial court is, therefore, affirmed.

ARTERBURN, C.J., and HUNTER and PRENTICE, J.J., concur; DeBRULER, J., concurs in result with opinion.

IN THE
SUPREME COURT OF INDIANA

WILLODEAN FORKS, et al.,)
)
Appellants,)
)
v ) No. 171 S 11
)
CITY OF WARSAW, INDIANA,)
)
Appellee. )

APPEAL FROM KOSCIUSKO CIRCUIT COURT

DeBRULER, J. - Concurring in Result

If appellants had objected to the summary procedure adopted by the trial court, either in the trial court or in their brief on appeal, I would vote to remand this case to the trial court for a full trial. In every case dealing with a constitutional claim, an unrestricted opportunity should be afforded the litigants to completely present the facts necessary to support their claims. However, in my view of the record and briefs in this case, appellants have never contended that the trial court committed error in making a summary disposition of their constitutional claim. Thus, because of the posture of this case, I would concur in the result of the majority opinion wherein it holds that the trial court did not commit error in this case by following a summary type procedure.

An extraordinary burden rested on appellants to establish by proof that

this classification is arbitrary and unreasonable. That burden was described in Borden's Farm Products v. Baldwin (1934), 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed.281, as follows:

> "Respondents invoke the presumption which attaches to legislation action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such it is a rebuttable presumption (cases cited). It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assult. Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack. When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge of other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. (cases cited)" 293 U.S. at 209.

Appellants plead in their complaint that they are permanent residents and registered voters of the territory sought t be annexed and that they own personal property located in the territory of substan value. They also plead that their stake in the proposed annexation is equal to th of owners of real estate in the territory

and that they have an equal interest in taxation, schools, roads, storm or sanitary sewers, water, electricity, fire and police protection, sidewalks and curbs, garbage collection and recreational programs. I would affirm the trial court judgment on the grounds that these allegations in the complaint are too general and unsupported to satisfy appellants' extraordinary burden of establishing that this classification was arbitrary and unreasonable.

## APPENDIX B

### Pertinent Parts of Trial Rule 12

" ***

(B) *** at the option of the pleader, the following defenses may be made by motion:

***

(6) failure to state a claim upon which relief can be granted, ***.

***

If, on a motion, asserting the defense number (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. ***."

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### Pertinent Parts of Trial Rule 56

(A) For claimant. A party seeking to recover upon a claim, counter-claim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty (20) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(B) For defending party--When motion not required. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is

sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party.

APPENDIX C

(395 US 621)
MORRIS H. KRAMER, Appellant,

v

UNION FREE SCHOOL DISTRICT NO. 15 et al.

395 US 621, 23 L Ed 2d 583, 89 S Ct 1886

(No. 258)
Argued January 16, 1969
Decided June 16, 1969

SUMMARY

A bachelor who lived with his parents in a certain school district in New York and neither owned nor leased taxable real property in the school district but was otherwise eligible to vote in the school district elections brought a suit in the United States District Court for the Eastern District of New York against the school district and each member of its board of education, claiming that § 2012 of the New York Education Law, which requires, for eligibility to vote in certain school district elections, either (1) ownership (or leasing) of taxable real property in the district or (2) parenthood (or custody) of children enrolled in the local public schools, violated the equal protection clause of the Fourteenth Amendment. The District Court, denying his request that a three-judge District Court be convened, dismissed his complaint (259 F Supp 164). On appeal, the

United States Court of Appeals for the Second Circuit reversed, ruling that the complaint warranted convening a three-judge court (379 F2d 491). On remand, the three-judge District Court ruled that § 2012 was constitutional and dismissed the complaint (282 F Supp 70)

On direct appeal, the United States Supreme Court reversed and remanded. In an opinion by WARREN, Ch. J., expressing the view of five members of the court, it was held that since the classification in § 2012 of the New York Education Law permitted inclusion of many persons having only a remote and indirect interest in school affairs, while excluding others having a distinct and direct interest, the section violated the equal protection clause of the Fourteenth Amendment.

STEWART, J., joined by BLACK and HARLAN, JJ., dissented, stating that the legislative classification was rationally related to a legitimate legislative purpose and that the court's decision could only be viewed as irreconcilable with the established principle that the states have broad powers to determine the conditions under which the right of suffrage may be exercised.

APPENDIX D

(395 US 701)
JOSEPH Q. CIPRIANO, Appellant,

v

CITY OF HOUMA et al.

395 US 701, 23 L Ed 2d 647, 89 S Ct 1897

(No. 705)
Argued April 24, 1969.
Decided June 16, 1969.

SUMMARY

An otherwise qualified voter of the City of Houma, Louisiana, who paid no property taxes, brought suit in the United States District Court for the Eastern District of Louisiana to enjoin the issuance of municipal utility revenue bonds approved at a special election from which he had been excluded. He also sought to obtain a declaratory judgment that a Louisiana statute limiting the franchise in such elections to property taxpayers was unconstitutional. A three-judge Federal District Court dismissed the suit, finding the statutory provisions constitutional (286 F Supp 823).

On direct appeal, the United States Supreme Court reversed and remanded. In a per curiam opinion, expressing the view of five members of the court, it was held that the challenged provisions violated the equal protection clause of the Fourteenth Amendment.

BLACK and STEWART, JJ., concurred in the judgment of the court on the ground that the case involved a voting classification wholly irrelevant to achievement of the state's objective.

HARLAN, J., concurred in the result because, while adhering to his view that the equal protection clause does not extend to state political systems, he considered himself bound by prior United States Supreme Court decisions to the contrary.

## APPENDIX E

Chapter 208, Sec. 1, p. 680 of the 1945 Acts of the General Assembly is the Indiana Election Code. Section 2 thereof was amended by the 1965 Acts, Ch. 261, p. 683, to read as follows:

"Sec. 2. When used in this Act the words and terms set out shall be construed as follows:

"***"

" 'Election': The word 'elections' ['election'] shall mean and include any election at which the electors of the state or of any subdivision thereof nominate or choose by ballot public officials or decide any question lawfully submitted to them."

"***"